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NOTES OF INDIAN CASES.

KAPURJI MAGNIRAM *v.* PANAJI DEVICHAND, I.L.R. 53 Bom. 110.

The right of a partner of a firm who enters into a contract in his individual character with a third person for partnership purposes came up for discussion and the question was whether he could sue alone on the contract without joining the other partners as parties to the suit. The learned Judges looked at the matter from several points of view and came to the conclusion that he alone could sue. The answer to the question depends on the correct interpretation of section 230 of the Indian Contract Act which embodies the law for this country. To disentitle the agent from suing the contract must under the section have been entered into by the agent on behalf of the principal. This essential has not been satisfied in the present case, as the agent entered into the contract in his own name though the result of it would have gone to the partnership. The decision of the Privy Council in *Agacio* v. *Forbes*[1] shows that the Act has only adopted the pre-existing English law on the matter. Viewed as a contract on behalf of the principal in which the agent has an interest, even then, the agent could sue on it himself. This was laid down in *Subrahmania Pattar* v. *Narayanan Nayar*[2] though only *obiter* and followed in *Mallhu* v. *Megh Raj*.[3] The right of an agent with an interest in the subject-matter of the contract to sue on the contract has been explained in *Coorla Mills* v. *Vallabhdas*[4] adopting the view of Sir Frederick Pollock and Mr. Mulla in their commentaries to the Indian Contract Act on the ground that to

1 (1861) 14 Moo P.C. 160 2. (1900) I.L.R. 24 M. 130
3. (1920) 55 I.C. 992. 4. (1925) 27 Bom. L.R. 1168 at 1181.

the extent of his interest in the contract the agent himself is a principal and is therefore entitled to sue and the provisions of section 230 do not stand in the way of the principal suing on the contract. In this connection, it may perhaps be asked whether an agent who in this view is only a co-contractee along with the principal who also is interested in the contract can sue alone without impleading his other co-contractees in the suit. *Cf.* section 45 of the Indian Contract Act.

The last and perhaps the most important point considered in the case is the effect of clause (2) of paragraph 2 of section 230 of the Indian Contract Act, *i.e.*, whether to give rise to a presumption of a contract to the contrary within the meaning of the section, it is only sufficient that *the agent* has not disclosed the name of the principal though the other party might otherwise be aware of the existence of a principal on whose behalf the contract has been entered into and the name of that principal. The language of the section certainly lends colour to the view that even if the other party obtains the knowledge of the identity of the principal from other sources, there would be a contract to the contrary and the contract may be enforced by or against the agent personally. This is the view which Fawcett, J., has adopted in the case under notice differing from West, J., in *Mackinnon Mackenzie & Co.* v. *Lang, Moir & Co.*[5] of whom it is probably not right to say that he overlooked the language of cl (2) above referred to, as the discussion by that learned Judge was with reference to that section. His Lordship apparently proceeded on the view that the person to whom credit has been given by the other party to the contract is the person entitled to sue and liable to be sued on the contract and this is the principle underlying section 230 of the Indian Contract Act as pointed by Sir Frederick Pollock and Mulla in their commentaries to the Act. It may also be noticed that the view of West, J., has been followed by the Lahore High Court in *Lyallpur Sugar Company* v. *Mul Raj*[6].

JYOTI PRASAD SINGHA DEO *v.* JOGENDRA RAM RAY, I.L.R. 56 Cal. 188.

This decision is one of some interest on the construction of article 17 of the second schedule to the Court Fees Act. The question that directly arose for decision was whether in an appeal against a decree for costs in a suit for partition of joint

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5. (1881) I.L.R. 5 Bom. 584. 6 (1921) 65 I.C. 473.

family properties, Court-fee has to be paid *ad valorem* on the amount of the costs objected to or whether a fixed fee of Rs. 15 has to be paid under article 17 (*vi*) of the second schedule of the Court Fees Act; and the learned Judge has held that as the suit for partition in a joint family is one falling under the latter provision, a memorandum of appeal against the decree in the suit whatever may be the nature of objection taken in the appeal is only liable to a fixed fee under this provision. Though it may be noticed that there is a conflict of opinion as to the provision of the Act under which a plaint or memorandum of appeal in suits for the partition of joint family properties falls, as to which reference may be made to *Rungiah Chetty* v. *Subramania Chetty*,[1] the decision under notice would affect the cases of suits for partition amongst co-tenants other than members of a joint family even in Madras, which according to the Madras High Court would fall under article 17 (*vi*) of the second schedule to the Act. See *Gill* v. *Varadaraghavayya*.[2] This decision would also seem to lead to the conclusion that even with regard to the cases falling under the other clauses of article 17 such as, suits to set aside summary decisions or orders of the Civil Courts not established by the Letters Patent or of the Revenue Courts, suits for mere declaration without consequential relief or suits to set aside an award or an adoption, a memorandum of appeal even though objecting to the decree in the suits with regard to costs alone, which may be a considerable amount is liable to a fixed Court-fee of Rs. 10 or 15 as the case may be and not *ad valorem* on the amount of costs the liability for which is objected to, as in suits for money under section 7. It is not clear whether this result was contemplated by the legislature; but the provisions of the Act lend themselves to the construction adopted by the learned Judge in this case. It is significant that there does not seem to be any direct decision on the question apart from the one under notice, although the enactment has been in force for over half a century.

GAHAR ALI HOWLADAR *v.* ABDUL OWAHAB SHIKDAR, I.L.R. 56 Cal. 192.

It is not strange that there is no prior reported decision on the point that where one of several judgment-debtors pays the whole decree amount into court to the credit of the decree-

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1 (1910) 21 M L.J. 21 (F.B.)
2. (1919) I.L R. 43 M. 396· 38 M.L.J. 92.

holder and the court receives it as such, time for a suit for contribution against his co-judgment-debtors runs from the date of such payment and receipt by the court and not only from the date when the decree-holder draws the amount from court. The proposition seems not capable of serious argument to the contrary, as the court in such a case receives the money acting as the agent or *quasi* agent of the decree-holder and the money is afterwards for all practical purposes as though in the pocket of the decree-holder himself. When, however, the learned Judges meet the argument to the contrary, namely, that time runs only from the date of withdrawal of the money by the decree-holder, by observing that if that argument were accepted the judgment-debtor who paid the amount into court would have no cause of action for contribution against his co-judgment-debtors, till after the amount is drawn by the decree-holder, it is not clear whether the observation does not proceed on a fallacy. The existence of the cause of action or its absence does not depend on the Limitation Act which merely limits the time within which an action can be brought, but on substantive law. As was pointed out by the Privy Council in *Hari Nath Chatterjee* v. *Mothurmohun Goswami*,[1] the intention of the law of limitation is not to give a right when there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right. That the third columns of the articles of the Limitation Act do not always mark the time of the accrual of the cause of action has been shown by Srinivasa Aiyangar, J., in *Seeti Kutti* v. *Kunhi Pathumma*.[2] It is therefore possible that there may be a cause of action for a suit for contribution as soon as the amount is paid into court and there is nothing to prevent limitation commencing to run from a later date, *i.e.*, when the decree-holder draws out the amount. As however the expression "date of payment" in the third column need not be restricted to the date of payment into the hands of decree-holder himself, payment into court so as to constitute it payment to the agent or *quasi* agent of the decree-holder vesting the dominion of the money in him, would be sufficient payment within the meaning of the article.

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1. (1893) I.L.R. 21 C. 8 at 18 (P.C.)
2. (1915) I.L.R. 40 M 1040 at 1062· 33 M.L.J. 320 (F.B)

JUGGI LAL *v.* SWADESHI MILLS COMPANY, I.L.R. 51 All. 182: 56 M.L.J. 282 (P.C.).

There may be deception by sound as well as by sight and an instance of such deception by sight gives rise to the well-known cause of action known as passing-off action by deceptive imitation of another's trademark. The complaint was that the defendant began to use trademarks which though if critically looked at by a person of such literacy as to have critical powers of observation would not be confused, yet would be apt to be confused by the illiterate and unobservant and in particular the imitation was such that a person coming and asking for lotus cloth as the plaintiffs' cloth was known in the market might be satisfied by having cloth delivered with the trademark of defendants. This was held to justify the action by the plaintiffs for damages. The High Court had taken the entire sales of the defendants and attributed a proportion to the trademark and had given profits on that. The Privy Council thought that method of dealing with the matter as too speculative and substituted instead a calculation of profit on the footing of the diminution of the plaintiffs' trade allowing some margin also for expansion.

BANKEY LAL *v.* RAGHUNATH SAHAI, I.L.R. 51 All. 189 (F.B.).

The question in this case was the phantom raised by the Privy Council decision in *Vaithialinga Mudaliar* v. *Srirangath Anni*[1] as to whether even under the Limitation Acts of 1871, 1877 and 1908 suits by reversioners after the death of a Hindu female would not be barred if the stranger was in adverse possession for over 12 years against the female. In other words whether *Runchordas case*[2] is still good law? The majority hold quite rightly that where Art. 141 applies there is no question of adverse possession. Whether possession was adverse against the widow or not, whether she might be barred or not the reversioner would not be barred. That was the view we took of that case when it appeared (*see* 50 M.L J. Short Notes, p. 10) and we are glad to note that the Privy Council has taken that view in *Jaggo Bai* v. *Utsava Lal.*[3] The last case, however, would seem to leave the question open as to the result of a decision against the widow in a suit for possession on the ground of limitation, and a further decision of the Privy Council might be necessary to

1. (1925) L.R. 52 I.A. 322· I.L.R. 48 M. 883· 49 M.L.J. 769 (P.C)
2 (1899) L.R. 26 I.A. 71: I.L.R. 23 B 725 (P C).
3. A.I.R. 1929 P.C. 166

remove the cobwebs of doubt. The true position in that matter would seem to be this: where the suit of the widow is dismissed on a ground of limitation the suit must be taken to be dismissed on a ground peculiar to the widow and such a decision cannot bar the suit by the reversioner. Where, however, the case is one governed by the Limitation Act of 1859—that is to say where the right was extinguished under the old Act and the stranger acquired a right before the Act of 1871 came into force—the case would be wholly different and a decision on those facts against the widow would also bar the reversioner. Such in fact was the case in *Hari Nath Chatterjee* v. *Muthurmohun Goswami.*[4] Slightly different was the case in *Vaithialinga Mudaliar* v. *Srirangath Anni,*[1] but that again was a case to which Art. 141 had no application. Unfortunately, the case under review adopts the unsound distinction that those cases deal with representation in suits, whereas in the particular case the point that arose was one of limitation which is governed by *Runchordas Vandrawandas* v. *Parvati Bhai.*[2]

PRAMATHA NATH DAS BAIRAGI *v.* CHAMPA DASI, I.L.R. 56 Cal. 275.

This decision brings into relief the undesirability of erecting as principles of law the statement of facts in a previous case from which a similar inference was drawn by the learned judges and the consequent abuse of precedents. Though the construction by a tenant of *pucca* structures on the leasehold property may be a piece of evidence—and a strong piece of evidence—for coming to the conclusion that the tenancy was of a permanent character, it cannot be asserted that the putting up of *pucca* structures is a legal prerequisite to create a permanent tenancy. Consequently the learned judges in the present case refused to treat the case of *Abdul Hakim Khan Chowdhury* v. *Elahi Baksha Saha*[5] as laying down the rule that putting up by the tenant of permanent structures is of the essence of permanent tenancy and pointed out the true limits of the decision in the case above referred to, though some of the observations in it were, it must be admitted, somewhat loosely expressed.

1 (1925) L.R. 52 I.A. 322: I.L.R. 48 M 883: 49 M.L.J. 769 (P.C.).

2 (1899) L.R. 26 I.A. 71: I.L.R. 23 B. 725 (P.C.)

4. (1893) L.R. 20 I.A. 183: I.L.R. 21 C. 8 (P.C.).

5. (1924) I.L.R. 52 C. 43.

SEETHAYYA *v.* SUBRAMANYA SOMAYAJULU, I.L.R. 52 Mad. 453: 56 M.L.J. 730 (P.C.).

In this case, the Privy Council reverse the decision of three Judges of the Madras High Court in *Somayajulu* v. *Seethayya.*[1] The question is one relating to the vexed subject of Estate or no Estate. The grant in the case was a Shrotriyam grant to a Brahmin. The question as it presented itself to the Privy Council was merely a question of construction of the grant. The High Court had proceeded on the rule as to presumption enunciated in *Muthu Goundan* v. *Perumal Iyen.*[2] Their Lordships applying the rule laid down in *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi,*[3] viz., that there is no presumption either way had to reconsider the question and held differing from the High Court that the grant was not a grant of both the warams, but of revenue only. The considerations that weighed with them were: (*i*) The use of the word Shrotriyam in connection with the revenue (Their Lordships do not accept the contention that Shrotriyam grant is necessarily of revenue only), (*ii*) the use of the word *mouja* which was held to denote occupied village by Sadasiva Aiyar, J., in *Venkata Sastrulu* v. *Sitaramudu,*[4] (*iii*) the fact that the grantors were Deshpandyas or revenue-farmers, (*iv*) the fact that the grantees were non-resident Brahmins. Their Lordships held that the cumulative effect of all these circumstances was to incline them to the view that the grant was only of revenue.

Another point of evidence also arose in the case. In this case, a copy purporting to be a true copy and more than 30 years old was produced. The question was whether it could be used to prove the contents of the original without more. In this case the copy was signed by the then agraharamdars with a statement that it is a true copy. The High Court held that the statement was admissible under S. 32, cl. (7) as a statement by a deceased person relating to a transaction under section 13, clause (*a*). The Privy Council held that it was admissible also as an admission by the respondent's predecessor-in-title. The High Court applied S. 90 of the Evidence Act to presume the genuineness of the copy. The Privy Council affirms this view. This is what their Lordships say on the matter: "The document is over 30 years old and is produced from proper custody. By S. 90 of the

1. (1922) I.L.R. 46 M. 92 (F.B.)
2. (1921) I.L.R. 44 M. 588: 40 M.L.J. 429 (F.B.)
3. (1922) L.R. 49 I.A. 286: I.L.R. 45 M. 586 at 588: 43 M.L.J. 640 (P.C.).
4. (1914) I.L.R. 38 M. 891: 26 M.L.J. 585.

Evidence Act of 1872 the Court may *presume* therefore the signatures authenticating the copy to be genuine. The statement to which the signatures are appended, *viz.*, that the document is a copy of the original appears to be evidence both for the reason given by the Chief Justice, *viz.*, as a statement relating to a relevant fact and also as an admission made by a party and a predecessor-in-title of the parties." The last is an intelligible ground. The previous seems to be somewhat of a liberal construction of S. 32, cl. (7). The judgment of the Privy Council thus affirms the proposition that S. 90 applies to copies; whether you could go further and presume under the section the genuineness of the original, their Lordships do not expressly say; possibly the judgment involves that—though not absolutely clearly.

PUNJAB COTTON PRESS COMPANY, LTD. *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL, I.L.R. 10 Lah. 161 (P.C.).

The Privy Council have in this judgment reversed the decision of the Lahore High Court reported in *The Punjab Cotton Press Company, Ltd.* v. *The Secretary of State for India*[1] on the ground that there was no finding by them that the action complained of by the plaintiff was taken by the defendants in pursuance of S. 15 of the Northern India Canal and Drainage Act VIII of 1873. The plaintiff's allegation was that the acts of the defendants were done not for preventing any accident to the canal but for the purpose of protecting a railway embankment, in which case the protection given by S. 15 of the Act would not be available to them. The judgment of the High Court however shows that the Court was satisfied on the evidence that the defendants acted in the manner alleged with a view to prevent an accident to the canal and the High Court held in consequence that the action was justified under S. 15. If the act itself was justified by statutory authority on the facts as found by the High Court, then the plaintiff must have been non-suited not merely on the ground that the action was statute-barred under Art. 2 of the Limitation Act but also on the ground that there was no cause of action at all for damages. The judgment of the High Court is however understood by the Privy Council as not containing any definite finding as to whether the operation of cutting the canal bund was for the purpose of preventing an accident to the canal. The Privy Council, however, state that Art. 2 will apply if it is proved on the facts that as a matter of fact the defendants' acts were really for the protection of the canal. This should not be understood as laying down that Art. 2 will be inapplicable if it is merely found that the acts were performed by the Canal Authorities in the honest though mistaken belief that they were authorised under the Statute to take action in the manner in which they acted for the purpose of preventing an accident to the canal. It would not matter if the acts themselves did not really and in fact prevent the accident to the canal. If of course they did, the defendants need not rely on limitation under Art. 2 as a defence as in that case they can plead statutory authority as a justification for their action and the plaintiff's suit would fail on the merits. The distinction pointed out above must be borne in

1. (1923) I.L.R. 4 Lah. 428.

mind notwithstanding the somewhat obscure language of the Privy Council judgment.

KIRPA SINGH *v.* AJAIPAL SINGH, I.L.R. 10 Lah. 165 (F.B.).

This Full Bench decision contains an instructive discussion as to how far the provisions of the Sikh Gurudwara (Punjab) Act VIII of 1925 have retrospective effect so as to affect pending appeals. The rules of interpretation as to the retrospective effect of statutes are no doubt already well established and this decision merely follows them but the value of the decision lies in the discussion relating to the application of the said rules with special reference to the provisions of the particular sections. Where the Court has to decide whether and how far particular sections of an Act part of which is retrospective by express statement or by clear implication, the question becomes instructive in the concrete application of the rules of interpretation stated in general language, to the particular points involved in a specific contention. This decision is one such case and is noteworthy as an instance of retrospective effect being given to particular sections of an act by reason of necessary implication with the qualification that the Court should not give a greater retrospective effect than the language renders necessary. The question of retrospective effect of similar legislation in Madras with reference to the Madras Hindu Religious Endowments Acts I of 1925 and II of 1927 is referred to in *Arunuga Thambiran* v. *Namasivaya Pandara Sannadhi*,[1] where their Lordships observe that "there is nothing in that Act which gives retrospective effect to proceedings already instituted." That decision merely held that a pending suit for settling a scheme does not abate altogether by reason of the passing of the Madras Act I of 1925. It does not follow that in the actual framing of the scheme by the Court the provisions of the Act with reference to the management of the temple can be ignored and that no part of the Act will have any application at all and that the Court is at liberty to ignore the Act altogether. That question will have to be examined with reference to the language of the different sections of the Act and a decision arrived at on a proper construction of the same.

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1 (1925) I.L.R. 48 M. 688: 49 M.L.J. 324.

N. V. N. NATCHIAPPA CHETTIAR *v.* KO THA ZAN, I.L.R. 6 Rang. 488.

Were the matter *res integra*, and merely rested on S. 101 it may possibly be argued that where the continuance of a mortgage is for the purchaser's benefit, no question of intention need arise but even then some difficulty will arise from the comma after the words "unless he declares." If there were a comma after the word "unless," the construction may be right but as it is "unless he declares" qualifies the last clause as well. The learned Judges in the case under notice say that *Gokaldas Purammal's case*[1] dealt with a state of affairs prior to the passing of the T. P. Act but they overlook the later decisions of the Judicial Committee in *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi*[2] and *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh*,[3] where they put it purely as a question of intention. But on the theory that given the option to choose, every man will choose what is to his interest, a presumption has been raised in favour of an intention to keep alive the mortgage wherever it is for his benefit. In certain cases, the presumption has been pushed to the extent of presuming such an intention even when at the time of the purchase the purchaser was not aware of circumstances necessitating such a continuance, as for instance that there was a later incumbrance in *Mahalakshmiammal* v. *Sriman Madhwa Siddhanta Oonnahini Nidhi*,[4] *Surjiram Marwari* v. *Barhamdeo Persad*,[5] *Subramania Pillai* v. *Palaniappa Mudali*,[6] *Velayuda Reddi* v. *Narasimha Reddi*[7] and *Duraisami Naidu* v. *Panadai Asari*.[8] Srinivasa Aiyangar, J., treats the rule as based on grounds of justice, equity and good conscience and he would hold that a person who acts in *bona fide* ignorance is in greater need of equitable relief. This looks very much like trying to find a reason for the rule. (See *Andi Thevan* v. *Nagayasami Chettiar*[9]). But where to presume it will be inconsistent with the possible mentality of the purchaser at the time of the purchase, the Courts have held the presumption to be rebutted. *Govindasami Thevan* v. *Doraswami Pillai*,[10] *Chidambaram Nadan* v. *Muni Nagendrayyan*,[11] *Tiruvengadam Pillai* v.

1 (1884) L.R. 11 I.A. 126· I.L R. 10 Cal 1035 (P C)

2. (1901) L.R. 29 I.A 9. I L.R. 29 Cal 154: 12 M.L.J. 73 (P.C).

3 (1911) L.R. 39 I.A. 68: I.L.R. 39 Cal 527: 22 M.L.J. 468 (P.C).

4 (1911) I.L R. 35 Mad. 642· 21 M.L J 811.

5. (1905) 2 C.L.J. 288.

6. (1913) 26 M.L.J. 94.

7. (1916) 32 M.L.J. 263.

8 (1928) M.W.N. 592.

9. A.I R. 1928 Mad 703· 55 M L.J. 369.

10. (1910) I.L.R. 34 Mad. 119 20 M.L.J. 380.

11. (1920) 39 M.L.J. 445.

Sabapathi Pillai,[12] *Bai Rewa* v. *Vali Mahomed*.[13] In *Ramasami Mudaliar* v. *Gopalasubba Nayakan*,[14] it has been held that the presumption embodied in S. 101 is an equitable presumption and if the purchaser's conduct has not been above board, the Court is not bound to raise that presumption where the circumstances under which the transaction took place are, if not fraudulent, of a very suspicious character. In *Bai Rewa* v. *Vali Mahomed*,[13] the mortgagee himself purchased the property and there were no mesne incumbrances then. Subsequently the sale was held to be invalid as being sale of trust property and the purchaser sought to use his mortgage as a shield. The Court points out that the only idea of the mortgagee could have been to discharge the mortgage as there was at the time of the mortgage no mesne incumbrance to be protected against. See also *Rajah of Kalahasti* v. *Sree Mahant Prayag Dossjee Varu*.[15] But in *Nasir-uddin* v. *Ahmad Husain*,[16] a subsequent purchaser with notice of a contract to sell in favour of another paid off certain mortgages on the property. It was held that in respect of any money paid by way of such discharge, they are entitled to stand in the shoes of the mortgagees whom they have paid off. The set of cases dealing with the question whether the purchaser in execution of a decree in a suit brought by the first mortgagee on his mortgage without impleading the puisne mortgagee can set up the first mortgagor's right as a shield against the puisne mortgagee turn largely on the effect of the old section 85 of T. P. Act and are not discussed here. See *Sukhi* v. *Ghulam Safdar Khan*[17] and *Venkataramana Reddi* v. *Rangiah Chetti*.[18] The effect of the revival of the first mortgage is a total revival and not partial as was suggested in *Syed Ibrahim Sahib* v. *Arumuga Thayee*.[19] (See *Muthammal* v. *Rama Pillai*,[20] *Sukhi* v. *Ghulam Safdar Khan*,[17] and *Jnanendra Nath Singh Roy* v. *Shorashi Charan Mitra*[21]).

Section 101 has been held to apply only to a case where a person other than the mortgagor becomes entitled to the property and on the principle that acquisitions by a mortgagor enure to the benefit of a mortgagee, thereby increasing the value of his

12 (1925) 49 M.L.J. 361
13 (1922) I.L.R. 46 Bom 1009.
14 (1928) M.W.N. 674
15 (1916) 30 M.L.J. 391
16. (1926) 31 C.W.N. 538.
17 (1921) I L.R. 43 All 469 (P.C.).
18 (1921) 41 M.L.J. 399
19 (1912) I.L R 38 Mad. 18.
20. (1917) I.L.R. 41 Mad. 513
21. (1922) I.L.R. 49 Cal 626 at p. 632.

security, it has been held in *Emperor* v. *Piari Lal*[22] that even where the mortgagor becomes entitled to the prior mortgage by inheritance, he cannot keep it alive as against his subsequent mortgagee and in *Rajah of Kalahasti* v. *Sree Mahant Prayag Dossjee Varu*,[15] though it was also a case of merger by inheritance, the decision went off on the other ground that at the time of succession, there were no puisne incumbrances.

YAN LIN *v.* MYAT SAN, I.L.R. 6 Rang. 506.

Though in the case of a wrongful attachment of the properties of a party to a suit malice has to be shown, it is now well settled that where the properties of a stranger are wrongfully attached it is *per se* sufficient to sustain a suit for damages. See *Kanaye Pershad Bose* v. *Hur Chand Manoo*,[23] *Gour Sundaree Debia* v. *Shumboo Chunder Mojoomdar*,[24] *Tilukhdari Singh* v. *Chulhan Mahton*[25] and *Assan Mahomed* v. *Kadersa Rowther*.[26] In certain cases the Courts have gone to the extent of holding that though the person actually making the attachment is a receiver or a third person, the person at whose instance and under whose directions the wrongful attachment takes place is liable for the tort. *Abdul Rahim* v. *Sital Prasad*[27] and *Binda Prasad* v. *Ram Chandar*.[28] But the question in the case under review was about the quantum of damages to be awarded where a person wrongfully attaches a stranger's cattle believing them to belong to the judgment-debtor. Though in certain cases of tort vindictive damages may be awarded by way of punishment, generally damages are assessed on the basis of compensating the person wronged and on that basis only such damages as flow directly from the wrongful acts and as a consequence thereof, have been awarded. In *Beauclerk* v. *Beauclerk*,[29] Bowen, L.J., says "speaking generally as to all wrongful acts whatever arising out of tort or breach of contract, the English law only adopts the principle of *restitutio in integrum*, subject to the qualification or restriction that the damages must not be too remote, that they must be in other words, such damages as flow directly and in the usual course of things from the wrongful act." It is on that ground that damages have been awarded in *Badri Prasad* v.

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15 (1916) 30 M.L.J. 391.
22 (1917) I.L.R 39 All 309.
23. (1870) 14 W.R. 120.
24 (1869) 12 W.R. 328
25 (1889) L R. 16 I A. 152: I.L.R. 17 Cal 131 (P.C.).
26. (1924) I.L.R. 2 Rang 181.
27. (1919) I L.R. 41 All. 658
28. (1921) I.L.R. 43 All. 452
29 (1891) P.D. 191 at 200.

Gopal Bihari Lal[30] and *Bhut Nath* v. *Chandra Benode*,[31] where goods were spoiled in the interim between attachment and return of the goods to the owner. In *Goma Mahad Patil* v. *Gokaldas Khimji and Tapidas Khimji*,[32] the Court awarded even the value of the goods stolen while under custody and that has been followed in *Bishambhar Nath* v. *Gaddah*,[33] without any independent discussion. The Judges in the *Goma Mahad Patil* v. *Gokaldas Khimji and Tapidas Khimji*[32] dissent from *Mt. Sabjan Bibi* v. *Shaikh Sariatullah*[34] where it was held that if cattle distrained die a natural death, then the tort-feasor is not liable for it, as that is not a natural consequence of the attachment. The case under review is *ad idem* with *Mt. Sabjan Bibi* v. *Shaikh Sariatullah*,[34] but the learned Judges prefer to follow *Goma Mahad Patil* v. *Gokaldas Khimji and Tapidas Khimji*[32] and award the value of the dead cattle also as damages. Except on the theory that the trespasser is a kind of insurer of the goods, it is difficult to see how the loss from the death of the cattle can be claimed. It is not a natural consequence of the attachment. The distinction may be that theft is an Accident or may be due to negligence, but death is an Act of God and both the sets of cases may thus be reconciled. But the basis of the *Goma Mahad Patil* v. *Gokaldas Khimji and Tapidas Khimji*[32] is that the trespass renders the defendants liable for the full value of the goods and the subsequent occurrence is no concern of the owner. The case follows *Keene* v. *Dilke*[35] where Baron Alderson states "if the sheriff had not taken the goods, possibly the Gas and Water companies *might never have* seized. If you wrongfully take my goods out of my possession, and they are stolen from you, you are bound to recoup me and recompense me for all the injury *occasioned* by the taking." It seems too much to read into this observation an absolute liability to return the goods *in specie* or pay their full value and the italicised words show that the injury must have been *occasioned* by the taking.

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30 (1919) I.L.R. 41 All. 553 at 558. 31 (1912) 16 C.L.J. 34
32 (1878) I L.R. 3 Bom. 74. 33 (1910) I.L.R. 33 All 306.
34 (1869) 3 Beng L.R 413: 12 W.R. 329.
35. (1849) 4 Ex. 388. 154 E.R. 1263

PALANIYANDI *v.* VELAYUDAM PILLAI, I.L.R. 52 Mad. 6: 55 M.L.J. 579.

The point in this case was as to whether a karnam service inam land enfranchised in the name of the widow and daughter enures for the benefit of the reversioners also. If enfranchisement in the name of the widow does not enure for the benefit of the reversioners, it is difficult to see how the joinder of the daughters can affect the question unless their joinder can be taken to indicate the intention to grant successive woman's estates to them. In the absence of words to that effect, it is difficult to presume such an intention. It is doubtful if such a settlement would be within the scope of the settlement officer's authority.

An attempt was also made in this case to apply the principle of Kannivadi case *Abdul Aziz Khan* v. *Appayasami Naicker*[1] to the sale by the widow and the daughters. As they purported to convey the absolute estate and not any indefinite precise estate the extent of which falls to be determined by the court, their Lordships held that the principle of the *Kannivadi case*[1] could not apply to the case.

RAJA OF RAMNAD *v.* SECRETARY OF STATE FOR INDIA, I.L.R. 52 Mad. 12: 55 M.L.J. 770.

Here a suit was brought for the recovery of money which the plaintiff paid as income-tax on figures returned by himself which wrongly included forest and fishery income which the Full Bench in *Chief Commissioner of Income-tax* v. *Zamindar of Singampatti*[2] has held to be not assessable by reason of the Permanent Settlement Regulation. The correctness of the Full Bench case was impeached by the Government on the basis of the Full Bench decision in Calcutta but their Lordships saw no reason to dissent from the Full Bench view.

The further question was as to whether the amount could be recovered, as the mistake was one of law and not of fact. Section 72 of the Indian Contract Act which governed the case does not say that the mistake should not be one of law. In the matter of contracts S. 21 expressly says that mistake in respect of law in force in British India is not a ground of relief in respect of contracts. As here no question of contract was involved, that section had no relevancy. It is curious that this aspect of

1 (1903) L R 31 I A 1 I.L R 27 M 131 (P C.)
2. (1922) I.L.R. 45 M. 518 (F B).

the case is not considered. The English Law on the subject is discussed but there could not be much doubt under that law that a payment under a mistake of law could not be recovered. While there is no reason to restrict the language of S. 72 by reference to S. 21 there is no reason either to enlarge the connotation of mistake under the law by including mistake of law. Every one is presumed to know the law. Just as coercion has been held not to be limited to coercion as defined in S. 15 of the Contract Act, *Kanhaya Lal* v. *National Bank of India, Ltd.*,[1] but has got to be read in the ordinary sense in which it is understood in law, mistake is to be understood, we think, subject to the ordinary limitations imposed by the Common Law as regards its connotation.

A further question that is considered is as to whether S. 52 of the Income-tax Act would bar a suit in such a case. (The corresponding section now is S. 67.) Their Lordships are of opinion that that section cannot apply to a case where there can be no assessment at all in law—the income being exempt, in other words, to a case where the Income-tax Officer has no jurisdiction at all to levy assessment. Whether the particular case in hand is one falling within that category is doubtful.

THE SECRETARY OF STATE FOR INDIA *v.* TRUSTEES OF SRI KUTTALANATHASWAMI TEMPLE, I.L.R. 52 Mad. 25: 56 M.L.J. 24.

Two questions were involved in the case: first, whether the plaintiffs were the owners of the property in question. Secondly, whether the lands were exempt from assessment. The two questions are distinct. While description of the property as temple poramboke would, we think, strongly support the position that the property was temple property—such a description is hardly of value in determining the question whether the temple is entitled to hold the land free from revenue. The Government may remit revenue in individual cases or in certain classes of cases but presumably it would be only as a matter of grace and can be re-called at any time. But a recognition of land as temple poramboke would be clear recognition of title of the temple to the land for it is not usual for the Government to reserve land for prospective purposes of the temple as in the case of roads and other secular public purposes. This distinction has not been, we think, sufficiently borne in mind in the case under review.

1. (1913) L.R. 40 I.A. 56. I.L.R. 40 C 598: 25 M.L.J. 104 (P.C.).

MORARJI *v.* ADMINISTRATOR-GENERAL, I.L.R. 52 Mad. 160: 55 M.L.J. 478.

"Hindus are born not made" is one of the current fallacies and has been rightly treated as such we think in this case.

Whether a person can be made a Brahmin, Kshatriya or a Vaisya may be a question of some difficulty, but, as according to the theory of Manu, Mlechchas are persons who have fallen from their high estate by not performing the Upanayana ceremony and as such becoming Vratyas, it may not be impossible even according to strict theory to make a Brahmin by undergoing the necessary prayaschitta.

But under the law as recognised by the Courts, usage being paramount, if for years, a certain class has followed the custom of Brahmins and has styled itself as such, there is no reason why Brahmin customs should not apply to such class, in other words there is no reason why such class should not be regarded as Brahmins.

But so far as persons becoming Hindus is concerned, it is a matter of common knowledge and the law has recognised it that whole communities are being Hinduised (*Fanindra Deb Raikat* v. *Rajeswar Das*,[1] *Ram Das* v. *Chandra Dassia*,[2] *Santala Bewa* v. *Badaswari Dasi*[3] and *Ram Pergash Singh* v. *Mussammat Dahan Bibi*[4]). Similarly, there is no reason why non-Hindu individuals should not become Hindus by the adoption of Hindu customs and Hindu beliefs. Just as there is a point at which deviation from Hindu customs will make a man non-Hindu. (*Ma Yait* v. *Maung Chit Maung*[5]) there is a point at which a non-Hindu can well be recognised a Hindu by his change of his beliefs and practices In *Sher Bahadur* v. *Ganga Bakhsh Singh*[6] we have an instance of the child of a Mahomedan woman brought up as a Hindu and Kshatriya and so treated. *Muthuswami Mudaliar* v. *Masilamani*[7] is also a case where conversion to Hinduism is recognised but it may be said that it was by virtue of caste usage that the validity was recognised. Arya samajists recognise conversion to their fold and though it may be that the

1 (1885) I L R 11 C 463 (P C).
2 (1892) I.L R. 20 C. 409
3. (1923) I L.R. 50 C 727.
4 (1923) I L.R. 3 Pat 152 at 176
5 (1921) L R 48 I A. 553: I L R 49 C 310 at 322 42 M L J 193 (P.C)
6 (1913) L R. 41 I.A. 1 I.L.R. 36 A 101 · 26 M.L.J. 291 (P.C).
7 (1909) I L.R 33 M. 342: 20 M.L.J. 49.

question whether a particular individual has become a member of a particular religious community might depend on the recognition by that community of such conversion, no question of recognition of conversion by the Hindu community need complicate the situation when the conversion is to Hindu community for that body is indeterminate with no voice or machinery of its own and having regard to the fact that the recognised injunction of the Smritis is to apply the Smritis to others so far as may be, subject to their usages when they have such—and in cases like the present where the convert has no usages—only excluding such rules as are special in their character and applicable only to special classes like Brahmins.

We think that Mr. Justice Venkatasubba Rao has given the correct lead on the subject and there is no reason why either according to strict legal theory or according to the view of Courts, a conversion should not take place so as to attract the consequence of making the Hindu Law applicable to such converts.

EMPEROR *v.* HIRU SATWA, I.L.R. 53 Bom. 184.

This is an interesting decision. The learned Judges have in effect held that when a piece of land is built on, the owner of the house is not bound to give information to the nearest Magistrate of the occurrence of any sudden or unnatural death on the premises under section 45 of the Criminal Procedure Code, though if it had remained as a vacant land, such an occurrence should have been reported and reliance has been placed on *Queen-Empress* v. *Achutha*[1] for this view. It must be admitted that this decision fully supports the view taken by the learned Judges. There seems, however, to be no distinction in principle, as between owners or occupiers of lands and houses in the matter of reporting about serious crimes to the proper authorities for investigation. The distinction suggested by one of the learned Judges that a house will be in a populous place while a piece of vacant land may not be and that therefore in the case of the former, the investigating authorities may come to know of the occurrence otherwise, seems, with all respect, unacceptable. The reference to the obligation of Zamindars and owners of proprietary estates in *Queen-Empress* v. *Achutha*,[1] under the old Madras Regulation (section 15 of Regulation XXV of 1802) does not seem to be in point, as the provisions of section 45 of the Criminal Procedure Code are clearly wider in many respects and the learned Judges have not referred to any decision which has considered the question whether owners of proprietary estates are under an obligation to report about such occurrences in houses within their Zamindari limits.

Coming to the interpretation of the word "land" used in the section it has been held from the earliest times that in the absence of anything in the context contradistinguishing it from a "house", it includes houses in its signification in deeds and wills. (See *Ewer* v. *Hayden*[2] and *In re Portal and Lamb*[3]). There is also section 3 in this English Interpretation Act, 1889, which enacts the pre-existing law that the word "land" includes houses on it. This rule has been followed in the case of Indian enactments and it was held in *Narayanamma* v. *Kamakshamma*[4] that unless there is anything in the context to limit it, the word "land" would take in houses also. All the authorities will be found collected by Fawcett, J., in *Hoosein Abdul Rehman & Co.*

1. (1888) I.L.R. 12 Mad. 92.
2. Cro. Eliz. 476, 658: 78 E.R. 727.
3. (1885) 30 Ch.D. 50.
4. (1896) I.L.R. 20 Mad. 21.

v. *Lakhmichand.*[1] The decisions in *Dayachand Nemchand* v. *Hemchand Dharamchand*[2] and *Durga Singh* v. *Bisheshar Dayal,*[3] where, with reference to the Court Fees Act, it was held that the word "land" would not include "houses" by reason of both the words being used in juxta-position in the enactment only emphasise the conclusion that by itself the word "land" is wide enough to include houses on it. Thus on principle and authority we venture to think the word "land" in section 45 of the Criminal Procedure Code may well be held to include houses on it and owners of houses may therefore be under an obligation to report occurrences of grave crimes in their houses to the proper authorities.

SURENDRA NATH CHATTERJI *v.* JAHNAVI CHARAN MUKHERJI, I.L.R. 56 Cal. 390.

This decision emphasises that there are no different degrees of proof for the different classes of cases under the Indian Law, the question whether anything is proved, disproved or not proved depending in all cases on the provisions of section 3 of the Indian Evidence Act. The learned Judges in this case have relied on the observations in *Jarat Kumari Dassi* v. *Bissessur Dutt,*[4] that in this country there is only one test or proof with regard to all civil cases. Stated in these terms, it is open to the suggestion that the standard of proof in criminal cases may be different from that in civil cases. Indeed there is some basis for this suggestion in the observations of Jenkins, C.J., in *Jarat Kumari Dassi* v. *Bissessur Dutt,*[4] where reliance was placed on some English cases for the proposition that the standard of proof in criminal cases is different, though there is hardly any warrant for it in the Evidence Act. (See also *Muni Reddi* v. *Venkata Row*[5]). The question came up again before the Calcutta High Court afterwards in *Weston and others* v. *Peary Mohan Dass,*[6] where Woodroffe and Cox, JJ., held that the standard of proof in civil and criminal cases is the same in view of the language of the enactment which is applicable to all cases and that the English cases if they lay down anything different are inapplicable here. This view was followed in *Moti Lal Ghose and others, In re.*[7] The learned Judges in the case under notice only re-affirm the rule in the case of wills.

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1. (1924) I.L.R. 49 Bom 40 at p. 55. 2. (1880) I.L.R. 4 Bom. 515
3. (1898) I.L.R. 24 All. 218 4. (1911) I.L.R. 39 Cal. 245.
5. (1912) I.L.R. 37 Mad. 238 at p. 244: 23 M.L.J. 447.
6. (1912) I.L.R. 40 Cal. 898.
7. (1917) I.L.R. 45 Cal. 169 at p. 200.

TAHER SHEIK CHOWKIDAR *v.* OTARUDDI HOWLADAR, I.L.R. 56 Cal. 412.

The question whether the appellate court has power under Order XLI, Rule 17 of the Civil Procedure Code to go into the merits of the appeal has frequently come up before the Courts though not under circumstances similar to those in the present case. In the other reported cases, it has happened that the appellate court while dismissing the appeal when the appellant or his pleader did not appear, has expressed its opinion agreeing on the merits with the decision of the lower court; but in the present case, the appellate court allowed the memorandum of cross-objections though no one appeared in support of the same and thus reversed the decision of the lower court. Whether the result is one allowing or dismissing the appeal, the question is always the same where the appellate court has power under the Code to go into and decide on the merits of the appeal in cases where the appellant or his pleader does not appear at the hearing. Though a single Judge of the Patna High Court in *Dulat Singh* v. *Srinivas Prasad Singh*[1] has taken the view that by reason of the change of the language in Order XLI, Rule 17 from what it was under section 556 of the Code of 1882, the appellate court has power to go into and decide the appeal on the merits, the weight of authority is to the contrary effect. (*Muhammad* v. *Manavikrama*,[2] *Nasir Khan* v. *Itwari*,[3] *Basudev* v. *Bideshi*[4] and *Maung Than Ge* v. *Maung Po Thin*.[5]) The learned Judges in the case under notice have come to the same conclusion, though they have not referred to any of these cases in their judgment. The difficulties that would result if a different view is taken are emphasised in *Muhammad* v. *Manavikrama*.[2] It may also be mentioned in this connection that even in cases of non-appearance of parties on an adjourned date of suits, it has been held that the Court has no power to go into the merits of the suit and pass a decree, though the terms of Order XVII, Rule 2 are not identical with those of Order XLI, Rule 17. (See *Phul Kuar* v. *Hashmatullah Khan*.[6]) It may however be doubted whether the High Court in the case under notice should not have remanded the memorandum of objections to the lower appellate court for decision in the light of their observations as was done in *Muhammad* v. *Manavikrama*,[2] rather than dismissing the same, as, in that event, the lower ap-

1 (1920) 57 I.C. 75 2. (1922) I.L.R. 45 Mad. 882: 43 M.L.J. 317.
3 (1923) I.L R. 45 All. 669. 4. (1928) I.L.R. 6 Rang 612.
5. A.I.R. 1925 Rang. 96. 6. (1915) I.L.R. 37 All. 460.

pellate court will have the opportunity to consider whether under the circumstances of the case, it should be dismissed at once or its consideration should be adjourned under Order XLI, Rule 17.

NYAUNGLEBIN CO-OPERATIVE BANK *v.* MAUNG BA U AND OTHERS, I.L.R. 6 Rang. 417.

Though at one time there was a conflict of authority in Madras and Allahabad as to whether a mortgagee who purchases the equity of redemption in a portion of the mortgaged properties does not thereby discharge the mortgage to the extent of the difference between the amount of his purchase and the value of the property purchased, it is now settled that his purchase stands on the same footing with a stranger's purchase and it discharges only such portion of the mortgage debt as bears the same ratio to the mortgage amount as the value of those items bears to the value of all the mortgaged properties. But the question in the case under notice was as to the date with reference to which the values of the properties are to be calculated for the purposes of the rule. Except the case in *Fakiraya* v. *Gadigaya*,[1] all the cases in India are agreed that the material date is the date of the mortgage and not the dates of the purchases of the equities of redemption in the respective properties (see *Gobind* v. *Kailash*,[2] *Sankar Lal* v. *Latafat Ali*,[3] *Bhagwan Singh* v. *Mazhar Ali Khan*[4] and *Meghraj* v. *Krishna Chandra Bhattacharji*[5]). Mr. Ghosh in his "Mortgages" extracts a passage from Jones to point out that in America the authorities are conflicting though the preponderance of authority is in favour of this view. In the case under review the question is left open on the ground that as at the time of the mortgage there was an unfinished house, the parties must have intended that the completed house was to be mortgaged. If the price of the house had varied at three different periods, namely, the date of mortgage, the date of completion of the house and the date of purchase, which is the period to be fixed for computation of values? Can the mortgagee enforce the completion of the building and, if he cannot, can a purchaser of the other properties contend that the value of this property must be calculated on the basis that it was completed when in fact it is not? These anomalies will arise by treating the question as one of intention of the parties.

1 (1901) I.L.R. 26 Bom. 88.
2. (1916) 25 C.L.J. 354.
3. (1916) 14 A.L.J. 713.
4. (1914) I.L.R. 36 A. 272.
5. (1923) I.L.R. 46 A. 286.

U. E. MAUNG *v.* P. A. R. P. CHETTIAR FIRM, I.L.R. 6 Rang. 494.

In Letters of Administration proceedings between A and B, the High Court granted letters to A, and B took the matter up to the Privy Council for decision. In the meantime after the grant, a creditor of the estate brought a suit against the estate represented by A on a pro-note executed by the deceased. As observed in *Bai Meherbai* v. *Maganchand Motiji*[1] the aggregate of legal rights and obligations were vested in him as the legal representative of the estate and a decree obtained against him will bind his successor as long as that decree was not the result of fraud or collusion. While this suit was pending B applied to the High Court for the appointment of a receiver alleging, among other things, that the suit was likely to be decreed, *ex parte*, but before the actual appointment of a receiver, the suit was decreed *ex parte*. The receiver then filed this application to re-open the proceedings and continue them with him as defendant. Even as an application for setting aside the *ex parte* decree, it was barred.

Their Lordships refer to *Neelaveni* v. *Narayana Reddi*[2] and *Ajodhya Mahton* v. *Mussammat Phul Kuer*,[3] where it has been held that a Court has no power apart from the provisions of O. 9, R. 13, C.P.C., to set aside an *ex parte* decree passed by itself, but distinguish them on the ground that they are all cases where a party to the original suit attempted to have the decree set aside. Again earlier the decision says that an *ex parte* decree is not a deliberate decision of the Court. It is difficult to see how else it operates as *res judicata*. The theory is that the Court decides on the materials furnished by the plaintiff in the absence of materials *contra*. The other ground that the receiver is not a party requires some elaboration. Firstly, if he is not a party or does not seek to be a representative of the party (namely, the estate) the decree will not bind him and will be a nullity. Secondly, the receiver comes in not as a stranger, but as a representative of the estate which was already represented. The fallacy lies in assuming that the suit was against A. The analogy is more that of a minor being represented by a guardian and another guardian coming on the scene later. Can it for a moment be contended that on the ground of mere negligence of the prior guardian the subse-

1. (1904) I.L.R. 29 Bom 96.
2 (1919) I.L.R. 43 Mad. 94: 37 M.L.J. 599 (F.B.).
3 (1922) I.L.R. 1 Pat. 277.

quent guardian can apply long after the period of limitation? Suppose also that a decree is passed *ex parte* against a widow. Can a reversioner apply to set it aside on the ground that the widow did not look after the interests of the estate? If the decision should have gone on the footing that apart from O. 9, R. 13, the Court has an inherent power to set an *ex parte* order aside, or that the Court has an inherent power to prevent abuse of its proceedings in which case it will be necessary to prove that the plaintiff was a party to the fraud, it will be intelligible. From the discussion about the "hardship to the original plaintiff" it looks as though no collusion was pleaded. If the administrator A had nominally contested what would be the position? Even in England where the Court has wider powers than under O. 9, R. 13, it would appear that if an improper judgment has been made against an estate without fraud or collusion, it has to be impeached by an original action. *See* Daniel's *Chancery Practice*, p. 1291 (7th edition).

U PO HNYIN *v.* THE OFFICIAL ASSIGNEE, I.L.R. 6 Rang. 689.

Apart from technical reasoning the decision in this case seems to be eminently satisfactory. When an attempt however is made to extract the underlying principle difficulty is encountered. The godown of the commission agent was burnt and he subsequently became insolvent. The goods in the godown were covered by a fire insurance policy taken up by the agent and the question arose whether the owner of the goods could claim the money paid by the insurer to the Official Assignee. In giving the owner the benefit of the equitable doctrine of tracing, their Lordships in effect extended the rule beyond the limits hitherto recognised. Incidentally it may be mentioned that the position taken up by the Trial Judge (see *In the matter of Syed Kasim, Deceased, Insolvent*[1]), that if goods be converted into money their value cannot thereafter be traced, a view long discredited in England and wholly unarguable after *Sinclair* v. *Brougham*[2] was rightly rejected. But the Court of Appeal erred in transgressing the upper limit of the doctrine. The goods had perished and what was left for the insolvent was a mere personal claim for indemnity. It is obvious from the nature of such a contract that the owner cannot maintain any claim as against the

1 (1927) I.L.R. 5 Rang 73
2. 1914 A.C. 398.

insurer. Some reliance seems to have been placed on the circumstance that the insurance premiums were paid by the owner. But it is well settled that such payment will at the best give him a lien for the moneys paid by him and nothing more. (See *In re Leslie*: *Leslie* v. *French*[3].)

If the value of the goods cannot be traced into the hands of the insurer, the question arises whether the payment of the amount to the Official Assignee will make any difference. It may not be correct to describe the insurance money as the *fruits* or the *proceeds* of the goods although it was paid under a contract in relation thereto. More accurately it may be described as a substitute for the property destroyed. Supposing in the case under discussion the agent had utilised the goods for his own purposes and had subsequently stocked other similar goods belonging to himself, can it be said that the new stock got automatically impressed with the trust? It is submitted that in the absence of an intention to make good the loss to the trust estate, the right of the owner is merely to bring an action for conversion or to waive the tort and recover the value of the goods as money had and received. (See in this connection *James Roscoe (Bolton), Ltd.* v. *Winder*[4] and article on "*The Limits of the Doctrine of Tracing*[5]"). Take again a somewhat similar case: after the goods had been destroyed, a sum of money is paid to the agent by voluntary subscriptions or by a relief fund. Can it be said that the owner may follow the value of the goods into those assets? The farthest limit at which the doctrine of tracing can be applied had been reached when the goods were destroyed and anything substituted by way of goods or money cannot be treated as trust property in the absence of a proved intention to that effect.

The judgment apparently proceeds upon a common fallacy, namely, that in such cases it is the goods that are insured. But it is now well settled that such a policy is a personal contract with the insured and that it is the *person* and not the *thing* that is insured. As Lord Hardwicke pointed out in *Sadlers' Co.* v. *Badcock*,[6] "It cannot properly be called insuring the thing, for there is no possibility of doing it, and therefore must mean insuring the person from damage." The case under review is really governed by the rule of Insurance Law which says that if

3. (1883) 23 Ch. D. 552.
4. (1915) 1 Ch 62.
5. (1927) 53 M.L.J. 133 (Journal) at pp. 139, 140.
6. (1743) 2 Atk. 554 at 556: 26 E.R. 733.

a person having an insurable interest such as a carrier, factor or commission agent recovers the full value of the goods from the insurer he will, after satisfying his own claim, hold the balance in trust for the owners. (*See* Porter's *Laws of Insurance,* pp. 59 and 64. *See also* observations of Bowen, L.J., in *Castellain* v. *Preston*[7]). And it is familiar law that the trustee in bankruptcy is bound by all the equities which affect the bankrupt. (See *In re Condon: Ex parte James*[8] per James, L.J.). The effect of applying the rule to the above case will be that the owner can recover the insurance amount from the Official Assignee less the sums due to the agent by way of commission, etc. The result might vary but in a slight degree from that which their Lordships arrived at, but the objection is to the extension of the doctrine of tracing.

A further question may arise as to what should happen if the insurance money payable by the Official Assignee to the owner of the goods does not cover his entire loss. Thus the policy taken up might be for a lesser amount than the real value of the goods. If it is correct to say that the farthest limit up to which the doctrine of tracing can be applied had been reached when the goods were destroyed, it follows that the relationship of debtor and creditor is constituted and the owner can prove in insolvency. Equity confers a higher right on the owner by means of the rule of insurance law mentioned above but it does in no way derogate from his rights under the general law. Consequently the owner of the goods may rank as an ordinary creditor as regards the loss not covered by payment of the insurance money.

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7 (1882) 11 Q.B.D. 380 at 398.
8. (1874) 9 Ch. App. Cas. 609 at 613

FAQIR SINGH *v.* THE CROWN, I L R. 10 Lah. 223.

This judgment rightly condemns the action of the Magistrate in the case who examined the accused at great length under section 342, Criminal Procedure Code and put as many as 79 questions to him and thereafter allowed the prosecution to adduce additional evidence to rebut the defence disclosed in the course of such examination. The so-called examination which was really in the nature of an inquisition and a cross-examination is not warranted by the terms of section 342. The case was rightly transferred from the file of the Magistrate as in the circumstances the accused had certainly a reasonable apprehension in his mind that he could not get a fair trial.

THE CROWN *v.* SHIB CHARAN, I.L.R. 10 Lah. 253.

The conviction of the accused in this case under sections 511 and 420, I.P.C., is clearly right. The contention that the facts proved amounted only to a preparation to commit an offence is obviously untenable. The definition of the term "attempt" in the Penal Code and the illustration to the section clearly show that the word is used in a wider sense than in the English Criminal Law. The Indian law takes in not only cases where the penultimate act towards completion of the offence has been done, but also cases where some precedent acts are done in the course of an attempt to commit the offence with the intent to commit the offence and towards its commission. In this view there can be no doubt that the offence of an attempt to cheat is established as soon as the accused is shown to have fraudulently applied to the currency office for payment to him of the amount of the currency notes. It would have been a mere preparation to commit an offence, if he had merely stopped with the first letter to the currency office asking for information as to the procedure to be adopted for recovery of the amount of the notes which he falsely alleged to have lost. It may be noted that the argument that there could be no attempt to cheat a person who had already been forewarned of the contemplated fraud and could not be cheated in fact was very properly rejected. There is also ancient authority for this obvious conclusion. See *Rex* v. *Hunter*.[1]

1. 11 Cox, C.C. 570.

MANGOBINDA SADHU *v.* MAHARAJA KUMAR SATYA NIRANJAN CHAKRAVERTY, I.L.R. 8 Pat. 190.

It is now well established that rules of English law as to real property in England can afford no guidance as to what has passed under an Indian grant. See *Rajah of Pittapur* v. *Secretary of State for India.*[1] This was laid down with special reference to the question whether mineral rights pass to the grantee in the absence of a special reservation about them in the grant. The Privy Council have repeatedly held that "even when a grant is made by a Zemindar of a tenure at a fixed rent, although the tenure may be permanent, heritable and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect." See *Sashi Bhushan Misra* v. *Jyoti Prasad Singh Deo.*[2] In all cases the conclusion must depend ultimately upon the true construction of the particular grant as made out by the language of the instrument and the circumstances of the case. See *Secretary of State for India* v. *Srinivasa Chariar.*[3] The same principle applies even where the tenure is rent free. See *Raghunath Roy Marwari* v. *Durga Prasad Singh.*[4] Where however the original grant is not forthcoming the question must turn upon the evidence of inclusion of the mineral rights in the grant itself. This does not mean that such a case cannot be established otherwise than by express evidence. The series of cases of the Privy Council culminating in *Girdhari Singh* v. *Megh Lal Pandey*[5] establish, that the mere facts of the lease or tenure being permanent, heritable and transferable do not necessarily carry with it the result that mineral rights also pass to the lessee or tenure-holder. See *Satya Niranjan Chakravarti* v. *Ram Lal Kaviraj and others.*[6] The true nature of the particular tenure in question may be such that the tenure-holder may have the mineral rights also, as in the ordinary case of proprietors of the soil. Just as Zemindars under the permanent settlement regulations are regarded as proprietors and in consequence entitled to the mineral rights as well, it may that having regard to the origin and scope and the revenue history relating to sub-infeudation of land, some of the subordinate tenure-holders have all the rights of the proprietors in the soil subject only to the duty of paying the agreed

1. (1929) 57 M.L.J. 64 (P.C).
2. (1916) L.R. 44 I.A. 46. I.L.R. 44 Cal 585: 32 M.L.J. 245 (P.C).
3. (1920) L.R. 48 I.A. 56 I.L.R. 44 Mad 421: 40 M.L.J. 262 (P.C).
4. (1919) L.R. 46 I.A. 158: I.L.R. 47 Cal 95: 36 M.L.J. 660 (P.C).
5. (1917) L.R. 44 I.A. 246: I.L.R. 45 Cal 87: 33 M.L.J. 687 (P.C.)
6. (1924) L.R. 52 I.A. 109: I.L.R. 4 Pat. 244: 48 M.L.J. 328 (P.C.).

rent which may be enforced also by a sale of the holding. The concrete question with reference to patni tenures of Bengal has been elaborately discussed in the decision under notice which takes the view that in this respect the patni *tenure* stands on the same footing as a mukarrari *lease* and hence does not carry with it the right to minerals in the absence of express words of grant. The Calcutta High Court had come to a contrary conclusion. See *Surendra Narain Sinha* v. *Bijoy Singh Doodhoria*.[7] According to the view of Das, J., in this case, the patnidar is purely a lease-holder and is not a proprietor of the soil and the creation of a patni tenure is not an alienation of zemindari tenure. S. 11 of the Patni Regulation (VIII of 1819) is explained by the learned Judge as a loose phraseology for the more accurate description in later legislations to the effect that the rent shall be the first charge on the tenure. No doubt the word "merely" is not found in S. 11 but the general meaning of the language used seems to indicate that the Zemindar's rights in the patni tenure are confined only to the rent reserved. If this be the correct interpretation, then it would go a long way towards establishing that a patni tenure is not a mere permanent lease but is analogous to the creation of a subordinate zemindari interest in the properties conveyed with full proprietary rights in the soil including the sub-soil rights as well. It is not necessary to discuss the matter further as the Privy Council may be deciding the question on appeal from the above decision. It may, however, be pointed out that apart from this general discussion, the particular grant in the case recites that the grantee shall be in possession of all zemindari rights and interests in the lands granted. These words no doubt can operate only upon the actual subject-matter of the grant and do not increase its corpus. The decision of the Privy Council in *Raj Kumar Thakur Girdhari Singh* v. *Megh Lal Pandey*[5] may be distinguished as it was the case of a lease and further the words used are only "with all rights." Further the clause specially permitting the grantee to cut and sell the trees which was found in that document showed that the lease was of the surface only with a superadded right to the trees.

JOTI PRASAD *v.* SRI CHAND, I.L.R. 51 All. 237 (F.B.).

Two important questions arose in this case, *viz.*, first, as to whether it is open to a decree-holder to rely upon a payment not

5 (1917) L.R. 44 I.A. 246: I.L.R. 45 Cal. 87. 33 M.L.J. 687 (P.C.).
7. (1925) I.L.R. 52 Cal. 655.

certified to the Court before the execution of the decree would otherwise be barred with the subsidiary questions whether the certifying should be by a separate application, whether it could be done after the execution petition, and whether Art. 181 would apply to such certifying; secondly, where there is an instalment decree payable on named dates with a clause that in default of two successive payments, the whole should be payable, whether limitation should run from the date of each default, the first default or the latest default. On the first question, they hold that certifying may be done at any time—that it is not a right but a duty and as such Art. 181 is not applicable to it—that it may be done before, as well as after the execution petition. This matter is substantially governed by the judgment of the Privy Council in *Raja Shri Prakash Singh* v. *The Allahabad Bank, Ltd.*,[1] which is to the same effect.

The second question is one over which there is considerable conflict—cases making distinction between decrees giving an option and those not giving an option, some recognising the right to waive and some not, the conflict not being confined to decrees alone but extending to Art. 132. Their Lordships get over the difficulty by saying that claims in respect of instalments payable on specified dates are governed by Art. 182, clause (7) so that if they are beyond that period they would be barred, but that if the claim is for the whole amount under the default clause, Article 181 would apply and limitation would run from the latter of any two successive defaults, applying apparently *Maung Sin* v. *Ma Tok*[2] which, as a matter of construction, held a default clause entitling the decree-holder to possession applied to each default and the decree-holder by accepting an earlier instalment after default was not precluded from availing himself of a later default.

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1 (1928) 56 M.L J. 233 (P.C).
2. (1927) I.L.R. 5 Rang. 422.

RAJA UDIT NARAYAN SINGH *v.* MUBARAK ALI, I.L.R. 51 All. 359: 57 M.L.J. 13 (P.C.).

The question in this case was as to whether the order of the Board of Revenue on appeal confirming the order of the Collector and Assistant Collector making an entry in the Revenue Register was appealable to the Privy Council. Their Lordships hold that it is not. Unlike another section of the Act which made the provisions of the Civil Procedure applicable to the determination of another kind of dispute, the section relating to this matter did not make the Civil Procedure applicable apparently because "all that the Collector could do besides amending the register after the summary inquiry under the section was to put the successful party into possession and his order would not debar the unsuccessful party from asserting his rights by suit in a Civil Court." Even in cases where the Civil Procedure Code is made applicable, whether such provision would attract the consequence of giving a right of appeal to the Privy Council their Lordships do not decide.

SKINNER *v.* NAUNIHAL SINGH, I.L.R. 51 All. 367 (P.C.).

This is a rather important case and would seem to decide that when there is a conflict between Art. 134 and Art. 140, the latter is to prevail. The facts were these: One Thomas Skinner was the original owner of the property. He mortgaged the property to one *X* on simple mortgage with a clause that the latter should be entitled to possession, on default in payment of interest. In 1864 Skinner died leaving a will which as finally construed by the Privy Council conferred only a life-interest on Thomas Brown Skinner, his son. The latter however believed he was the absolute proprietor and gave a mortgage with possession in renewal of the earlier mortgage. Their Lordships decided in *Skinner* v. *Naunihal Singh*[1] that this mortgage conveyed to the mortgagee the right under the earlier mortgage In 1872, in execution of certain money decrees, the mortgagee purchased the equity of redemption. He in his turn purporting to be the absolute owner mortgaged the property to *Y* and subsequently in 1903 the property was sold to *Y*. The life-estate holder Thomas Brown Skinner died in 1919 and the plaintiff as the remainderman sued to redeem the mortgage of 1863. The first Court held that Art. 140 governed the case and the suit brought in 1922 was not barred by limitation. On appeal, the High Court took the extraordinary step of deciding the case

1. (1913) L.R. 40 I.A. 105: I.L.R. 35 A. 211: 25 M.L.J. 111 (P.C).

under Art. 134 though the mortgage-deed and the subsequent sale-deeds were not before it on the ground that the facts admitted of no dispute, against the protest of the plaintiff-respondent. Their Lordships animadvert upon the course in these terms: "It appears to their Lordships to be highly irregular for any Court either to assume without the admission of all parties that material facts are not in dispute or to proceed to draw inferences from those facts where no evidence of them has been placed before the Court." However, on appellant's consenting to proceed upon the basis of the facts assumed their Lordships considered the question and arrived at the conclusion as stated above.

The following points seem to be decided by their Lordships:—

(*i*) For the application of Art. 134 the fact that at the time of the transfer the mortgagee had ceased to be a mortgagee or that he did not take possession as mortgagee was immaterial. It was also immaterial that he should have thought he was absolute owner if in fact he was only a mortgagee and similarly immaterial whether he got possession before, under or after the mortgage if in fact he purported to transfer the property to the transferee.

(*ii*) The transfer contemplated by Art. 134 is a transfer other than an express transfer of the original mortgage.

(*iii*) If at the date of the transfer, the equity of redemption vested in a life-estate holder, in such a case Art. 140 applied and till the remainder fell into possession, time did not begin to run.

(*iv*) If, at the time of the transfer, the equity of redemption vested in a person holding in fee, time would begin to run and would not stop running by the fact that before the limitation period expired, it vested in some other person for life.

As a result their Lordships held the subsequent alienations being ineffective in law to convey title, and the defence of limitation being also not available, the position of the defendant was that of a mortgagee and he was liable to be redeemed under Art. 148 within 60 years of the period prescribed for redemption under the document.

The reasoning of their Lordships would seem to be equally applicable to cases coming under Art. 141 and as a result cases like *Sesha Naidu* v. *Periasami Odayar*[1] which hold that in a case of conflict between Arts. 134 and 141, the former should prevail would no longer be good authority.

1. (1921) I.L.R. 44 M. 951: 41 M.L.J. 163.

ANNAJI RAMCHANDRA *v.* THAKUBAI DATTATRAYA, I.L.R. 53 Bom. 335.

Questions similar to the one in the present case, *i.e.*, of an improper order of remand by the Lower Appellate Court, have come frequently before the High Court in recent years. Granting that an Appellate Court has a power of remand in the exercise of its inherent jurisdiction and apart from the provisions of Order 41, Rule 23 (see *Ghuznavi* v. *Allahabad Bank, Ltd.*[1] and *Radhakrishna Rao* v. *Venkata Rao*[2]) it must obviously be restricted to cases where the Appellate Court cannot do justice under the other provisions of the Code, such as O. 41, Rr. 25 and 27. In the case under notice, the Appellate Court could well have acted under O. 41, R. 25; consequently the High Court interfered with the order of remand and pointed out the proper procedure to be adopted. It is not difficult to point to instances where the Appellate Court can rightly pass orders of remand under its inherent jurisdiction; one of such cases would be where the Appellate Court orders an amendment of the plaint. *Radhakrishna Rao* v. *Venkata Rao*[2] and *Karuppanna Pillai* v. *Ezhumalai Pillai.*[3] If as the learned Judges hold in the case under notice the order of remand is not one falling under O. 41, R. 23, it is not clear how an appeal could lie to the High Court under O. 43, R. 1 (*u*). Compare *Sheikh Muhammad Maracayar* v. *Rengasami Naidu*[4] and *Radhakrishna Rao* v. *Venkata Rao*[2] It is possible that the learned Judges interfered with the decision in the view that though there might be no appeal, it was open to the High Court to interfere in its revisional jurisdiction. In this connection it is interesting to notice the decision of the Madras High Court in *Venkamma* v. *Goparaju Perraju,*[5] where it was held that though the Appellate Court had no power to act under O. 41, R 23, as the decision of the first Court was not on a preliminary point and though the Appellate Court might have acted under O. 41, R. 27 and consequently it should not have remanded the case under its inherent powers, the High Court could not interfere in revision under S. 115 of the Civil Procedure Code. See, however, *Venkatarama Aiyar* v. *Sundaram Aiyar.*[6]

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1. (1917) I L R. 44 C 929 (F.B)
2 (1924) I.L R. 48 M 713 · 47 M.L.J. 552
3. A.I.R. 1927 M 849.
4 (1921) 16 L.W 515.
5. A I.R. 1928 M 991: (1928) M.W.N. 164.
6 (1926) M W.N 48 92 I.C. 1045

RAM KALI *v.* KHAMMAN LAL, I.L.R. 51 All. 1.

BANKE BIHARI *v.* BRIJ BIHARI, I.L.R. 51 All. 519.

Both these cases deal with the question of partition, that is to say, how far a declaration of intention, unilateral and otherwise, is affected by subsequent change of intention. Separation can be effected by the unequivocal declaration of one member of his intention to separate but such a declaration can affect only his status and the status of his branch but not that of the other members *inter se*. Much difference of opinion is possible on the facts as to whether the declaration especially when it is couched in notices or is to be inferred from conduct, is intended to be final or only tentative—in other words, whether the separation is only an attempted separation or a completed separation. The effect of one piece of conduct might be destroyed by another. The declaration has got also to be communicated to others before it can take effect. There is undoubtedly *locus poenitentiae* before communication to all the members. Even after communication to other members, the Privy Council has ruled in *Palani Ammal* v. *Muthuvenkatachala Moniagar*[1] that the intention may be abandoned before the intention so declared is given effect to by a decree of Court. When once the decree is passed it is no longer possible for the individual member to recall his expressed intention. The same must be the case where the members agree to his declaration and consent to partition. Thereafter the only possible way in which the family can become joint is by agreeing to be reunited. Before the offer of partition is accepted by the other members, it should be open to the party making the offer to withdraw. The second of the cases under review lays down that with the consent of the other members, it can be withdrawn. But that does not exclude the position that the declaration of intention can be withdrawn even without consent so long as it has not been acted upon and resulted in a final severance. A statement apparently *in curiam* in the earlier case that an explicit declaration cannot be withdrawn is commented on and explained in the later case.

RUKIA *v.* MEWA LAL, I.L.R. 51 All. 63.

Two persons were added as legal representatives of the plaintiff who claimed as reversioner—one was the widow and the other was her son who though not son by the deceased was according to her entitled to succeed by caste custom. The Court

1. (1924) L.R. 52 I.A. 83: I.L.R. 48 M. 254 48 M.L.J. 83 (P.C.).

upheld the custom and gave a decree to the son. On appeal by the other side making only the son a party the Court found against the custom and then the question was whether the Court could give a decree in favour of the widow under O. 41, R. 33. Their Lordships held they should not. O. 41, R. 33 is, their Lordships say, invests the Court with an exceptional power and it should be sparingly exercised. At one time, Courts were disposed to be somewhat liberal, especially the Madras High Court, but there has been stiffening since. The English precedents cover only cases of alternative claims which form the subject of the illustration to the rule and cases of re-trial, but it is conceded that the power is not confined to such cases. The power of the Court to interfere would be very much circumscribed if the narrow construction of O. 41, R. 20 as to making of parties suggested in *Chockalingam Chetti* v. *Seethai Ache*[1] is adopted. There might be a difference between making a decree against a person in his absence and making a decree in his favour. The view taken in this case is that in either case you can interfere only in favour of the persons who are actually parties to the appeal.

SURAJ NARAIN *v.* SUKHU AHIR, I.L.R. 51 All. 164 (F.B.).

The point that fell to be considered in this case was as to whether a bond by a minor given after attaining majority in renewal of a bond given during minority for cash borrowed could be supported under S. 25 of the Contract Act. There is considerable conflict of authority on the subject and the Allahabad High Court by a majority decide in this case that it cannot be so supported. The view taken is the same as that taken by the Madras High Court in *Ramaswami Pandia Thalavar* v. *Anthappa Chettiar.*[2] The ground of the decision is that the payment was consideration for the bond and was exhausted. If the bond was valid, that could form the consideration for the new bond but the bond being void under the law the consideration could not again form consideration for a valid bond. As for cl. (2) of S. 25 the argument is that it is not a case of something voluntarily done nor could the bond be said to be a promise to compensate. As for the latter argument, there is a whole volume of authority under Art. 116, Limitation Act, which applies the article to mere promises to pay money. But the real argument is what is done upon request and with a view to a contract is

1 (1927) L.R. 55 I.A. 7· I.L.R. 6 Rang. 29 54 M.L.J. 88 (P.C)
2 (1906) 16 M.L.J. 422.

not something voluntarily done and you cannot erect the consideration of a contract declared by public policy to be void into a voluntary service or act within the meaning of S. 25. The distinction is very subtle and naturally does not appeal to all minds, for instance, it did not appeal to Justice Mukerji in this case. The danger of minors who have just attained majority being persuaded to give a bond for old bonds given during minority is a real danger and the judgment of the majority recognises that danger and gives effect to the stricter and the literal view of the section.

KUNJ BIHARI *v.* BINDESHRI PRASAD, I.L.R. 51 All. 527.

In this case, the decision is that if a payment is directed to be made within a certain time by a decree but there is no provision in the decree that the amount is to be paid into Court the judgment debtor cannot take advantage of the fact that the Court was closed and make the payment into Court on the reopening day. A different view has been taken in *Wana mard Ravji* v. *Natu walad Murka*[1] and *Sankaran Unni* v. *Raman.*[2] Seeing that Order 21, Rule 1 gives the judgment-debtor an option, we prefer the view taken in these cases. Under S. 10 of the General Clauses Act on which reliance is placed in *Wana mard Ravji* v. *Natu walad Murka,*[1] the rule is applicable not only to cases in which an act is directed to be done but also to cases in which the act is allowed to be done. The language is wide enough to cover the case, but even supposing as Mr. Justice Krishnan thinks in *Sankaran Unni* v. *Raman*[2] that the section cannot apply to the case of acts directed to be done by *decrees* as distinguished from those directed to be done by *Acts* or *statutes,* the cases that recognise the principle (see, for instance, *Aravamudu Aiyangar* v. *Samiyappa Nadan*[3]) do not make any such distinction though the distinction was available. When the statute gives one an option, it is not, we think, for the Courts to say that he is bound to make the payment directly to the decree-holder on pain of his losing the benefit of any concession shown to him by the decree.

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1 (1910) I L R. 35 B. 35 2 (1924) 48 M.L.J. 596
3. (1898) I.L.R. 21 M. 385

RANEEGUNGE COAL ASSOCIATION, LTD. *v.* TATA IRON AND STEEL CO., LTD., I.L.R. 53 Bom. 271.

The learned Judges have held in this case that the circumstance that a reference to arbitration turns on a question of law is not by itself a ground under section 19 of the Indian Arbitration Act for the Court to refuse a stay of the proceedings in a suit on the same subject-matter. The decision would, we believe, have been the same if the question had arisen under cl. 18 of the 2nd Schedule to the Civil Procedure Code of 1908. The reference in the case was one regarding the construction of a business contract relating to a colliery and the arbitrators appointed under the contract were the Bengal Chamber of Commerce who would be more competent to understand the terms of such a contract than a Court of Law. After the decision of the Court of Appeal in *Metropolitan Tunnel and Public Works* v. *London Electric Ry. Co.,*[1] where most of the cases referred to by the learned Judges in the case under notice have been considered, there can be little doubt, that there should be a stay of suit in such a case. The reasons for a stay of suit are stronger under the Indian Arbitration Act than under the corresponding English Act, as pointed out by the learned Judges, because there is no power under the Indian Act to compel an arbitrator to state a case on a question of law and his decision on the question of law would be final unless by reason of the mistake of law by the arbitrator, the award falls within the restricted class of cases of error apparent on the face of the record. Indeed, it has been held in this country that a refusal to state a case on a question of law under section 10 of the Act would not amount to misconduct on his part. (See *Arunachela Aiyar* v. *Louis Dreyfus & Co.*[2] and *Sewdutrai Narsaria* v. *Tata Sons, Ltd.*[3]) It may, however, be pointed out that if in the course of the arbitration proceedings, the arbitrator is about to commit a mistake on a pure question of law, it would be open to parties to move the Court under section 5 of the Arbitration Act to revoke the submission. (See *East and West India Dock Company* v. *Kirk and Randall*[4] and the cases referred to therein and *Sewdutrai Narsaria* v. *Tata Sons, Ltd*[3].) The Court may then revoke the submission in a proper case, unless the arbitrator agrees to state a case on the question of law. If, however, the parties do not immediately apply for a revocation of the submission, but wait till the award is passed they can no longer object to the award on the ground of misconduct for this reason. In this connec-

1. (1926) 1 Ch. 371.
2 (1927) 27 L.W. 267.
3. (1921) 27 C.W.N. 494
4 (1887) 12 A.C. 738.

tion it may be mentioned that if a case is stated by the arbitrator on a question of law to the Court, the opinion of the Court is not liable to appeal as being merely passed in its consultative jurisdiction for the guidance of the arbitrator. If, however, the arbitrator sets out the opinion of the Court on the face of his final award and acts upon it, if the opinion of the Court is wrong, it would be open to the Court afterwards to still set aside the award, on the ground of error apparent on the face of the record, thus correcting the wrong opinion originally given by the Court. See *British Westinghouse Electric and Manufacturing Co., Ltd.* v. *Underground Electric Railways Company of London, Limited.*[1]

PARSHARAM YESHWANTSHET *v.* LAXMIBAI, I.L.R. 53 Bom. 360.

In this case, the learned Judge has held following *Subrao Mangeshaya* v. *Manjapa Shetti*[2] that a permanent lease granted by a mortgagor in favour of the mortgagee subsequent to the creation of the mortgage and as a distinct transaction is invalid as a clog on the equity of redemption and therefore not binding on the mortgagor. No objection can be taken to the decision if it were based on any ground of undue influence or fraud exercised by the mortgagee on the mortgage in obtaining the permanent lease, the burden of proving the circumstances leading to the undue influence or fraud being on the mortgagor as in any other case. (See *Melbourne Banking Corporation, Ltd.* v. *John Brougham.*[3])

If, on the other hand, the decision has been rested on any rule of equity that a permanent or long lease by the mortgagor to the mortgagee after the mortgage is invalid apart from any undue influence exercised in the particular transaction, we venture to think that the matter requires a closer attention having regard to the English cases and the grounds of decision of those cases. It must be pointed out at the outset that even in the case of *Hickes* v. *Cooke*[4] Lord Eldon does not take the same view as Lord Redesdale that such leases are invalid apart from any question of undue influence or unconscionable bargain. His Lordship held that such leases even though imprudent or foolish would be valid. It must be remembered that the case itself went off on the question of laches and the validity of the lease did not come up for direct decision. Regarding the validity of the leases by the mortgagor to the mortgagee the observations of

1. (1912) A.C. 673.
2. (1892) I.L.R. 16 Bom. 705.
3. (1882) 7 A.C. 307.
4. (1816) 4 Dow. 16.

both the noble Lords do not agree as pointed out above. Coming to the decision of Lord Redesdale, his Lordship was a party to two prior decisions on the same question in *Gubbins* v. *Creed*[1] and *Webb* v. *Rorke*.[2] In the first of these cases, his Lordship distinctly opened the judgment with the words that a lease by the mortgagor to the mortgagee would not be for that very reason invalid and found in that case undue influence and set aside the lease on that ground. In the second case, the first ground on which such leases were said to be invalid was that they were opposed to the spirit of the usury laws, a ground which is no longer valid as pointed out by the House of Lords in *G. and C. Kreglinger* v. *New Patagonia Meat and Cold Storage Co., Ltd.*[3] The second ground was that the mortgagor would not be allowed to grant a lease of the mortgaged properties to third persons without the consent or concurrence of the mortgagee and if he did grant a lease to a third person on more profitable terms, the mortgagee could oust the tenant by entering on the properties under his power as an English mortgagee. It will be easily recognised that this ground is inapplicable in this country to the case of simple mortgages as a simple mortgagee has no right to possession and so cannot force the mortgagor to grant the lease to him on less favourable terms than to a stranger. Again, after the recent decision of the House of Lords in *G. and C. Kreglinger* v. *New Patagonia Meat and Cold Storage Co., Ltd.*,[3] where the nature of a clog on the equity of redemption was fully discussed and placed beyond doubt by Lords Haldane and Parker, it cannot be contended that a mortgagee can in no case stipulate for a collateral benefit beyond the principal, interest and costs on the mortgage amount. (*See* pp. 38 and 55.) The suggested distinction between the cases of sales of the equity of redemption and leases has not been accepted even in England. (See *Ford* v. *Olden*.[4]) As pointed out by Jessel, M.R., in *In re Hallet's Estate*[5] and by Lord Haldane in *G. and C. Kreglinger* v. *New Patagonia Meat and Cold Storage Co., Ltd.*[3] the older cases in equity are not of such great authority as in the Common Law which is supposed in legal theory to be immemorial. In the face of these considerations, one can very well follow the doubts entertained by the late Sir Rash Behari Ghose on the soundness of the decision in *Subrao Mangeshaya* v. *Manjapa Shetti*[6] which the learned Judge has followed in the case under notice.

1. (1804) 2 Sch & Lef 214: 9 R.R 71.
2. (1806) 2 Sch. & Lef 601 · 9 R.R. 122.
3. (1914) A.C. 25 at 38, 55 and 56
4. (1867) 3 Eq. 461
5. (1879) 13 Ch. D. 696.
6. (1892) I.L.R. 16 B. 705.

RABINDRA NATH DAS *v.* JOGENDRA NATH DEB, I.L.R. 56 Cal. 432.

Two propositions of law have been laid down by the learned Judges in this case. As to the second, namely, that though a prosecution when started may have been *bona fide*, it may cease to be such when circumstances are discovered which would show that there are no grounds for it and that a continuance of the prosecution thereafter would give rise to a claim for damages for malicious prosecution, it is well founded on principle and amply supported by authority. The other proposition that an application for sanction to prosecute is itself a prosecution on which an action for malicious prosecution can be grounded is as recognised by the learned Judges themselves open to serious doubt. All that is determined in such an application is the question whether there should subsequently be a prosecution or not. Such an inquiry is quite a distinct one from the prosecution itself which comes in at a later stage. It is on this aspect of the matter that the cases where a complaint has been made, but the Magistrate calls for a report from the police or himself ascertains even after notice to the accused, whether the complaint should be entertained and summons or warrant should issue have a bearing. In *De Rozario* v. *Gulab Chand Anundjee*,[1] *Golap Jan* v. *Bholanath Khettry*,[2] *Sheik Meeran Sahib* v. *Ratnavelu Mudali*[3] and *Arunachella Mudaliar* v. *Chinnamunusamy Chetty*[4] it has been held that at this stage it is not a prosecution but only an inquiry whether there should be a prosecution or not and that prosecution commences only after a summons or warrant is issued to the accused to answer the charge. Again, as the learned Judges themselves point out, even after the sanction, the prosecution does not follow *naturally* from the order granting sanction to prosecute as in the case of giving information to the proper authorities from which, in the natural course, a prosecution follows (cf. *Balbhaddar Singh* v. *Badri Sah*[5]) because though a sanction to prosecute has been given, the person to whom it is given is not bound to prosecute the other. It cannot, therefore, be asserted that when the question comes to be examined on principle, the decision in *Narendra Nath De* v. *Jyotish Chandra Pal*,[6] which the learned Judges have followed, may not be reconsidered.

1 (1910) I.L.R 37 Cal. 358 2 (1911) I.L.R. 38 Cal. 880.
3. (1912) I.L.R. 37 Mad. 181: 25 M.L.J. 1.
4. (1926) 24 L.W. 22. 5. (1926) 51 M.L.J. 42 (P.C.).
6. (1922) I.L.R. 49 Cal. 1035.

SUKHAN *v.* THE CROWN, I.L.R. 10 Lah. 283 (F.B.).

The question referred to the Full Bench was how much of the confessional statement made to the Police which was to the effect "I had removed the *karas*, pushed the boy into the well and had pledged the *karas* with *A*" was admissible in evidence under S. 27 of the Indian Evidence Act. The majority hold that the only portion of the statement admissible is that the accused had pledged the *karas* with *A*. The dissenting minority hold that S. 27 renders admissible the statement, *viz*, "I had removed the *karas* and had pledged them with *A*." The judgments discuss the question elaborately with reference to the previous decisions of the various High Courts. It must be conceded that the admissibility of the statement does not depend upon the actual language in which the confession is made by the accused. The section allows so much of the information as relates distinctly to the fact thereby discovered to be proved. The admissibility of the information must depend upon its intrinsic character and not upon the manner in which the sentence conveying the information is framed by the Police officer or the prisoner. If therefore the accused in this case had stated that he had removed the *karas* from the boy whom he pushed into the well and pledged them with *A*, even then the portion of the statement that he pushed the boy into the well cannot become admissible under S. 27. This much is conceded by all the Judges. There are however certain decisions which take the view that it is not permissible for the Court to split up the language used by the accused in conveying the information. See for instance the observations of the Judges referred to in *Sogaimuthu Padayachi* v. *King-Emperor.*[1] It is submitted that the correct view is however that laid down by the Full Bench in this decision. On the question on which however there was a difference of opinion among the learned Judges, *viz.*, whether the portion of the statement "I had removed the *karas*" was admissible, we think the view of the minority is to be preferred and is in accordance with the more recent decisions of the High Courts. What sets the Police on motion is not the mere information that some *karas* were pledged with *A* but that the *karas* that were being worn by the deceased boy were pledged with *A*. That portion of the statement is therefore one that "relates distinctly to the fact thereby discovered" and should be received in evidence. We think the majority view is unduly restrictive of the scope of S. 27. On the other point that S. 39 of the Evi-

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1 (1925) I.L R. 50 Mad. 274

dence Act cannot let in as evidence what cannot directly come in under S. 27 and is prohibited under Ss. 24, 25 and 26 the view of the majority is certainly correct and should be accepted. The judgments in the case deal with the questions very fully and are instructive.

SRIMATI SARAT KUMARI BIBI *v.* RAI SAKHI CHAND BAHADUR, L.R. 56 I.A. 62: I.L.R. 8 Pat. 382: 56 M.L.J. 130 (P.C.).

It is well established that a party who propounds a will must satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator. Where however circumstances exist which excite the suspicion of the Court and whatever their nature may be, it is for those who propound a will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of a document. (See *Tyrrell* v. *Painton.*[1]) A typical instance of cases of that sort will be where the person who writes or prepares a will takes a large benefit under it as laid down in *Barry* v. *Butlin.*[2] The Privy Council hold in this case that the "benefit" need not be (as the High Court held) "a pecuniary benefit, a legacy, for instance, more or less of a substantial nature." The will set up in this case purported to appoint the person who prepared it, a manager of the testator's estate for life at a salary of Rs. 250 a month. He was also allowed to debit the estate with proper conveyance charges, travelling expenses and daily diet expenses. There was a further provision for an increment of salary in case the income of the estate increased. Their Lordships hold that that person received a benefit within the meaning of the rule in *Barry* v. *Butlin.*[2] On the evidence their Lordships find that the testator was not aware of the aforesaid provisions of the will but that he was aware of and approved, all the other provisions of the instrument propounded as his will. The further question arose whether probate of the will could be given omitting the provisions not shown to have been inserted with the knowledge and approval of the testator. As the latter part is so distinct and severable from the true part, that the rejection of it does not alter the construction of the true part, probate was granted of the rest of the document. This is on the principle that execution of what was shown to be the true will and something more may

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1. (1894) P 151. 2. (1838) 2 Moo P.C. 480

be treated as execution of the true will alone. The position may be different where the rejection of the words alters the sense of the remaining portion. A will may in such circumstances stand on a different footing from an instrument *inter vivos*.

AMBIKA PRASAD *v.* CHANDRAMANI KUER, I.L.R. 8 Pat. 396.

After the explanation of the true import of the judgment in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*[1] as expounded by the Privy Council in the later case of *Rangasami Gounden* v. *Nachiappa Gounden*,[2] there is no reason why the learned Judges should have felt themselves constrained by the facts of the earlier decision to hold as they did, that even a consent of the next reversioner to an alienation by a limited owner which is procured by giving him a substantial consideration should operate to raise a presumption of necessity so as to shift the onus of proof from the alienee. The doctrine that consent operates *proprio vigore* to validate the alienation was expressly rejected by the Privy Council. Its only value is "as affording evidence that the alienation was under circumstances which rendered it lawful and valid." If therefore the question becomes one of evidentiary value to be attached to the consent, a purchased consent may in the circumstances be obviously such as to give no reasonable ground for holding that the sale was for necessary or proper purposes. The Court is not in such circumstances compelled to hold as a matter of law that the alienation supported by such a consent is necessarily valid unless proof is forthcoming that the same was not for binding purposes. There is nothing in principle which justifies the Court in laying down a rule of law to that effect. Such a view is really opposed to the observations of the Privy Council in the *Gounden case* at page 534.

Their Lordships have pointed out that the true theory is only that which holds that consent does not give force *per se*, but is only of evidential value. They further point out that the contrary view will make the rule as to total surrender an idle one and also that it is based on the fallacy that the reversioner together with the widow represents the estate. There can therefore be no intermediate view that any sort of consent irres-

1 (1907) L R. 35 I.A. 1: I.L.R. 30 All. 1. 17 M L.J. 605 (P.C).
2 (1918) L R. 46 I.A. 72 I.L R. 42 Mad 523: 36 M.L J. 493 (P.C).

pective of its nature and the circumstances attending it, must shift the onus of proof from the alienee to the person who objects to the alienation. In the very case decided by their Lordships, though the consent was a real and free one it was totally futile as the transaction being a secular gift could not obviously be a justifiable alienation. It should also be borne in mind that the consent of the reversioner which is referred to by the Privy Council as raising a presumption of necessity is described as the "consent of such reversioners as might fairly be expected to quarrel with the transaction," if it were not really for justifiable purposes. In a case where the alienation is by a widow to the next reversioner himself, it would follow that the consent of the alienee himself cannot in the circumstances be regarded as the requisite "consent" within the rule laid down by the Privy Council and the alienation cannot be supported on that basis alone (apart from any question of surrender or of actual necessity). The onus even in such cases must be on the alienee to justify the sale in his favour.

A purchased consent cannot have a different effect and must really be treated as a fraudulent exercise of power on the part of the reversioner at any rate in cases where it is not shown that the consent would have been forthcoming even if consideration were not paid. Its effect, however, on the person who consents is different as he cannot attack the alienation if he turns out to be the actual reversioner. This is of course on the principle that he has elected to treat the transaction as good. Even if a presumptive reversioner gives his consent to an alienation without any consideration it has been held that he is personally precluded from objecting to the transaction later on. See *Ramakotayya* v. *Viraraghavayya*.[1]

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1 (1928) 56 M.L.J. 755 (F.B.).

MAUNG PO KYAW *v.* MA LAY, I.L.R. 7 Rang. 18.

About three days after the pronouncing of the judgment, the appellant through his pleader applied for a copy of the judgment and decree. Whether the application was made orally to the clerk of the Court or in writing, it does not appear from the report. The clerk of the Court appears to have told the pleader that as the decree was not ready by then, the application for a copy of the non-existent decree could not be accepted. The pleader without demur accepted the statement and deferred applying for the decree copy till the decree was signed. The application was diligently made the next day after the decree was signed by the Judge. The Court held that this was not an effective application for a copy of the decree and that the interval between the date of pronouncing the judgment and signing the decree could not be excluded in computing the "time requisite for obtaining a copy of the decree" within the meaning of S. 12 of the Limitation Act, 1908. All the High Courts, except Calcutta —where too the decisions are by no means uniform—have held that the period could not be deducted unless steps had actually been taken to obtain copies by an application put in after the judgment, as the delay in the office is none of the applicant's concern. The Patna High Court which for some time held, following *Bani Madhub Mitter* v. *Matungini Dassi*,[1] that the period could be deducted has now fallen in line with the other High Courts (see *Jyotindranath Sarkar* v. *The Lodna Colliery Co*[2]) and the Calcutta High Court has, after *Pramatha Nath Roy* v. *Lee*,[3] modified the original absolute rule and held that the test is the conduct of the appellant and whether any period claimed to be deducted need not have elapsed if the appellant had taken reasonable and proper steps to obtain a copy of the decree or order. See *Kamruddin Hyder* v. *M. N. Mitter*.[4]

The facts in the case under notice seem to be *ad idem* with those in *Tarabati Koer* v. *Jagdeo Narain*,[5] where an application was put in and was formally returned with an endorsement that the decree was not ready and the application must be renewed later. But as in Calcutta the more liberal view then prevailed, much help may not be derivable from that decision. In *Pramatha Nath Roy* v. *Lee*[3] their Lordships in explaining *Bani Madhub Mitter* v. *Matungini Dassi*[1] say that "In that case judgment was

1 (1886) I.L.R. 13 C 104 (F.B). 2 (1921) 6 Pat. L.J. 350 (F.B.).
3. (1922) L.R. 49 I.A. 307: I.L.R. 49 C 999: 43 M.L.J. 765 (P.C).
4. (1924) I.L.R. 52 C. 342. 5 (1911) 15 C.W.N. 787.

pronounced on July 17, 1883 and the decree was signed on July 23, so that only six days elapsed between the pronouncing of the judgment and the signing of the decree. *It would be impossible for anybody to suggest that that was an unreasonable time."* If this means that where the decree is signed within a reasonable time after the judgment is pronounced, the interval can be excluded, it will mean that the party is liable to be punished for any unreasonable delay in the office.

As under O. 20, R. 7, Civil Procedure Code, the decree is directed to bear the date when the judgment is pronounced, it has been uniformly held that the "date of the decree or order" in Arts. 151 to 157 of the Limitation Act means the date of the judgment and the difference of opinion arose only in connection with the words "time requisite to obtain a copy of the order or decree" in S. 12. Though the failure to pronounce a judgment in open Court as required by O. 20, R. 1 may for some purposes be treated as a mere irregularity, yet if the parties or their pleaders had no notice of the judgment, then the date of the judgment is only the date when they get to know of the judgment. See *Mahomed Akil* v. *Assadun-nissa Bibee*[6] and *Sagarmal Marwari* v. *Lachmisaran Misir.*[7] The question has arisen under special Acts like the Survey and Boundaries Act, Registration Act, etc. and it has been held under those Acts that the date of the "making of the order" is the date when the order is pronounced, where it is pronounced immediately after hearing the parties but where orders are reserved, then the date when the order is communicated to the parties (see *Annamalai Chetti* v. *Colonel J. G. Cloete,*[8] *Secretary of State for India in Council* v. *Gopisetti Narayanasami Naidu,*[9] *Muthiah Chetty* v. *Suppan Servai,*[10] *Abdul Ali* v. *Mirja Khan*[11] and C.M.A. No. 269 of 1928 (Madras High Court). But what is to happen if one party is present and the other is absent and the tribunal hearing the party present pronounces the order immediately? The logical result of the reasoning in some of the cases would suggest that the date of "the making of the order" as against the absent party is the date when it is communicated to him.

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6 (1867) 9 W R 1

7 (1922) I.L.R. 1 Pat. 771

8 (1883) I.L.R. 6 M 189

9. (1910) I.L.R. 34 M. 151.

10. (1913) I L.R. 38 M. 291.

11 (1903) I.L.R. 28 B 8.

HANUMAN PRASAD SINGH *v.* MATHURA PRASAD SINGH, I.L.R. 51 All. 303 (F.B.).

In the Civil Procedure Code of 1882 there was no mode of execution provided in the case of decrees for joint possession of immoveable property. The present Code has supplied the defect in O. 21, R. 35 (2). We do not have questions of joint possession cropping up as frequently in Madras as in Allahabad or Calcutta for the obvious reason that we do not have here the kind of joint holding they have there. In this case, their Lordships hold that the fact that the plaintiff the joint owner has not been previously in possession is no ground for disallowing a decree for joint possession in his favour. They also hold that the Court has a discretion in the matter of granting a decree but that the discretion must have reference to the rights and interests of the parties concerned and not to such considerations as its usefulness, practicability or the likelihood of the decree leading to quarrels or rioting. If there has been long separate possession with the acquiescence of the joint owners and there has been no denial of title or ouster, a decree for joint possession will not be given In those circumstances the remedy for the party who is not satisfied with the arrangement is to sue for partition. Joint possession is at best a very unsatisfactory state of thing when parties quarrel and the real reason why such a decree is sought for in those provinces consists in the fact that it affords facilities for the obtaining of a decree for partition in the Revenue Courts.

ANWAR KHAN *v.* MUHAMMAD KHAN, I.L.R. 51 All. 550 (F.B.).

The point that arose for consideration in this case was as to the power of the Insolvency Court to deal with the title of a transferee long before adjudication under S. 4 of the Provincial Insolvency Act. The language of this section is similar to that of S. 7 of the Presidency Towns Insolvency Act and the scope of that section was the subject of a decision of a Full Bench of the Madras High Court in *The Official Assignee of Madras v. Narasimha Mudaliar.*[1] The view indicated in that case which is in accordance with that expressed by Mr. Justice Rankin (as

1 (1929) I.L.R. 52 M 717 57 M.L.J. 145 (F B).

he then was) in *Jnanendra Bala Debi* v. *The Official Assignee of Calcutta*[2] is that though the Court has very wide powers, it has a discretion in the matter and the discretion should not ordinarily be exercised as, for instance, to make a decree against the debtors of the estate when the truth of the debt is in dispute or to pronounce upon a question of *benami* in respect of a transaction several years old and so forth but only in cases where the Official Receiver has a superior title to that of the bankrupt, *e.g.*, in addition to cases of fraudulent preference and voluntary alienations also in case of alienations, etc., coming under section 53 of the Transfer of Property Act and alienations or change of possession after an available act of bankruptcy. Ss. 53 and 54 of the Provincial Insolvency Act confer special rights on the Official Receiver of avoiding certain transfers which cannot but for those sections be avoided at all. The Court would have no power under S. 4 to set aside transactions on the ground of fraudulent preference or on the ground of their being voluntary alienations except in the manner and subject to the conditions imposed by those sections. There are other sections of the Act which confer special rights on the Receiver and also provide for special exemptions, *see* for instance S. 51 of the Act in case of execution creditors and execution purchasers. These and similar questions which turn upon the special rights created by the act are appropriate matters to be dealt with under S. 4. When other questions of title are dealt with by the Court in its discretion the ordinary law and procedure will have to be followed. *See* for cases of such exercise *Ramaswami Chettiar* v. *Ramaswami Aiyangar*,[3] *Chittammal* v. *Ponnusami Naicker*[4] and *Venkatram* v. *Chokkier*,[5] which indicate the extent to which the Court has proceeded and also the limits beyond which it has declined to proceed. For instance in the last case, while upholding the Lower Court's order to deliver possession of the father's (insolvent's) share to the purchaser, the High Court declined to make a similar order as regards the son's share. According to the case under review, the matter is for the sound discretion of the Court.

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2. (1925) I.L.R. 54 C. 251.
3. (1921) I.L.R. 45 M. 434: 42 M.L.J. 185.
4. (1925) I.L.R. 49 M. 762: 50 M.L.J. 180.
5. (1927) I.L.R. 51 M. 567: 55 M.L.J. 163.

BASDEO NARAIN *v.* MUHAMMAD YUSUF, I.L.R. 51 All. 285.

Their Lordships applied in this case the test laid down in *Jagat Narain* v. *Mathura Das*[1] which held that "benefit" that would justify an alienation by the managing members need not necessarily be for "defensive" purposes to a permanent lease on a favourable rent accompanied by payment of a large premium. Their Lordships held that even so, the lease could not be justified as taking ready money and permanently leasing family property at favourable rent without more cannot be regarded as *beneficial* within the meaning of the rule laid down therein.

TOSHANPAL SINGH *v.* THE DISTRICT JUDGE OF AGRA, I.L.R. 51 All. 386.

In determining whether sons are liable for the debts of the father, it has been laid down generally that if there is an antecedent civil obligation with nothing criminal in it out of which the liability to pay arose, the sons are liable though his subsequent acts with reference to it assume also a criminal character. If the act out of which the liability arises is criminal the fact that there is a civil liability to pay compensation imposed by law would not impose upon the sons the duty of discharging it. The effect of these decisions is to restrict the exemptions to a very narrow margin. Applying this test, an agent or servant who has in his custody money by such fact of custody being under a civil liability to return it, the son would be liable even though he might have had no right whatsoever to touch a single pie out of it. Exemption would be available only in cases where the very taking of the thing is criminal. Where the taking is innocent the subsequent appropriation alone being criminal, the son would be liable. Whatever the old Hindu Law rule, that it made such subtle distinctions which are the refinements of modern criminal law, seems improbable. A more satisfactory test would have been possibly to see what the Hindu Law regarded as criminal.

MAUNG BAN GYI *v.* MA NGWE BON, I.L.R. 7 Rang. 107.

Property sold in execution of a money decree and purchased by the decree-holder was restored to the judgment-debtor when, on appeal, the decree was not reversed but only modified by reducing the amount. Considering the extent of the varia-

1. (1928) I.L.R. 50 A. 969 (F.B.).

tion the decision is unimpeachable, but in so far as it proceeds on broad grounds without putting it as a question depending on the extent of the modification, it is open to question. The cases relied on are all under the old Code (S. 583) and it is pointed out in *Beswada Sundararama Reddi* v. *Enuga Raghava Reddi*[1] (where even the correctness of *Syed Nathadu Sahib* v. *Nallu Mudaly*[2] is doubted) that S. 144 of the Code of 1908 gives a discretion to the Court in granting restitution and does not make it obligatory on the Court to restore the property irrespective of other considerations.

We are not sure if the object of the rule that in the case of the decree-holders purchasing at execution sales, the purchase is subject to the final result of the litigation between them and their judgment-debtors, is to "prevent the interests of judgment-debtors suffering by sales of their property before their liability is finally determined" and to "avoid judgment-creditors profiting at the expense of their debtors by becoming purchasers in sales pending litigation by way of appeal." Stated in this form, the protection of the judgment-debtor's interest will equally be frustrated when a stranger buys the property with knowledge of the pendency of the appeal and yet it has been generally held that the "*bona fides*" required of the stranger is not negatived by mere knowledge of the pendency of an appeal. (See *Raghavachari* v. *Pakkiri Mahomed Rowther*[3] and *Moitheensa Rowthan* v. *Apsa Bivi*.[4]) It will be more reasonable to suggest that the basis of the rule is that the decree-holder must be deemed to have *procured* an erroneous decision, when the same is substantially modified on appeal. In *Official Receiver, Madura* v. *Chettiappa Chetty*[5] the learned Judges hold that not only a purchase by the decree-holder but a purchase by any person who is a party to the suit will be set aside on reversal of the decree. This decision suggests a different line of reasoning which may require further examination as one of the learned Judges (Wallace, J.) seems by no means very positive in the statement of his opinion.

[END OF VOL. LVII.]

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1. (1921) 42 M.L.J. 315.
2. (1903) I L R. 27 M. 98.
3. (1916) 30 M.L.J. 497.
4. (1911) I.L.R. 36 M 194: 21 M L.J. 969.
5. (1925) I.L.R. 48 M. 767: 49 M.L.J. 452.